Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1976
No. 76-172

JOHN F. KENNEDY and ROSEMARY KENNEDY, His Wife and JAMES R. MELINSON and MONICA MELINSON, His Wife, and RICHARD J. BRAEMER and TONI BRAEMER, His Wife and All Parents of Nonpublic School Students Similarly Situated,

Petitioners

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN
GRACE SLOAN, State Treasurer of the Commonwealth of Pennsylvania
HENRY E. CROUTER, Intervenor
JOSE DIAZ, et al., Intervenor,

Respondents

BRIEF IN OPPOSITION TO PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
Statement of Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ:	
I. Petitioners' claim has been judicially reviewed and rejected by the lower courts	5
II. The District Court and Court of Appeals correctly refused to modify an order which had previously been affirmed by this Court	6
III. The State's compliance with a Federal Court order prohibiting payment under an unconstitutional statute is not a taking of property without due process of law	11
Conclusion	13

TABLE OF CITATIONS

CASES:

Board of Regents v. Roth, 408 U.S. 564 (1972)	11
Goss v. Lopez, 419 U.S. 565 (1975)	11
Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. three-judge Court 1969)	8
Lemon v. Kurtzman, 403 U.S. 602 (1971)	2, 7, 8, 10
Lemon v. Kurtzman, 411 U.S. 192 (1973)	2, 3, 5, 6, 7, 8, 9, 10, 12
Sloan v. Lemon, 413 U.S. 825 (1973)	2, 3, 5, 7, 8, 10

STATUTES:

"Non-Public Education and Secondary Education Act", Act of June 19, 1968, P.L. 232, No. 109, 24 P.S. §§5601-5608 (1976-1977 Supp.) 6

"Parent Reimbursement Act for Non-Public Education", Act of August 27, 1971, P.L. 358, No. 92, 24 P.S. §5701 .....2, 7, 11, 12

STATEMENT OF QUESTIONS PRESENTED

I. Was Petitioners' claim judically reviewed and rejected by the lower courts?

II. Did the District Court and Court of Appeals correctly refuse to modify an order which had previously been affirmed by this Court?

III. Does the State's compliance with a Federal Court order prohibiting payment under an unconstitutional statute constitute a taking of property without due process of law?

STATEMENT OF THE CASE

On July 21, 1972, a three-judge District Court held the Act of August 27, 1971, P.L. 358, No. 92, 24 P.S. §5701, (hereinafter Act 92), known as the "Parent Reimbursement Act for Non-Public Education" unconstitutional. Pursuant to that holding, the Court perpetually enjoined respondent Grace M. Sloan, Treasurer of the Commonwealth of Pennsylvania, from distributing funds under the Act. Pursuant to 28 U.S.C. §1253, this Court directly reviewed the three-judge District Court's order, and on June 25, 1973, affirmed. *Sloan v. Lemon*, 413 U.S. 825 (1973).

This Court's decision in *Sloan v. Lemon*, supra, came approximately two months after *Lemon v. Kurtzman* [*II*], 411 U.S. 192 (1973) *(Lemon II)*. In *Lemon II*, this Court held that the District Court to which *Lemon v. Kurtzman* [*I*], 403 U.S. 602 (1971), was remanded, did not abuse its discretion by compelling Pennsylvania to reimburse non-public schools for debts owed pursuant to purchase of service contracts between the schools and the State, since those services were performed prior to this Court's decision in *Lemon I*.

It is this Court's decision in *Lemon II* interpreting *Lemon I* that forms the gravamen of this case. Petitioners believe that *Sloan v. Lemon*, supra, is on all fours with *Lemon I*, supra, and, therefore, contend that the case *sub judice* should be a *"Sloan II"* premised upon the holding of *Lemon II*.

With that end in mind, John F. Kennedy, James R. Melinson, Richard Braemer, and their respective spouses,

all parents of children who attended non-public schools during the 1971-1972 and 1972-1973 school years commenced a class action in February 1974, against the Pennsylvania Parent Assistance Authority in the Commonwealth Court of Pennsylvania.

By agreement of all parties, the action in the Commonwealth Court of Pennsylvania was continued and a joint petition was filed before the three-judge District Court in *Sloan* which had issued the original order enjoining payments. The petitioners' position was that the three-judge District Court should modify its injunction to allow payments for the two school years because they had relied on the validity of the act in sending their children to non-public schools. Respondent Sloan, believed that the reasons underlying the three-judge Court's original order together with this Court's affirmance of that decision precluded any modification of that order, and that this Court's decision in *Lemon II* was inapplicable to the facts *sub judice*. On July 21, 1975, the three-judge District Court denied relief declaring:

> ". . . our final order of July 21, 1972, is clear on its face and binding upon the parties . . . and believing that the Supreme Court's affirmance of our final order makes any substantive modification of it inappropriate. . ."

Both Kennedy and the Pennsylvania Parent Assistance Authority appealed that order to the United States Court of Appeals for the Third Circuit. After submission of briefs, the Court of Appeals affirmed the judgment of the District Court on May 11, 1976.

Both Kennedy and the Pennsylvania Parent Assistance Authority are petitioning this Court for a writ of

certiorari to the United States Court of Appeals for the Third Circuit. This response is directed solely to the petition of Kennedy. The Pennsylvania Parent Assistance Authority's petition has not been docketed by this Court pending a determination of a motion to dispense with printing. If that motion is granted, respondent Sloan will move to have this brief in opposition serve as a response to both petitions, in light of the identical nature of the arguments presented.

REASONS FOR DENYING THE WRIT

I. Petitioners' Claim Has Been Judicially Reviewed and Rejected by the Lower Courts

Petitioners request this Court to grant their petition and issued a writ of certiorari to the United States Court of Appeals for the Third Circuit to consider whether the three-judge District Court should be instructed to conduct a "plenary hearing." This request and, indeed, much of petitioners' arguments premise upon an allegation that the District and Circuit Court refused to review the merits of petitioners' claim. This simply is not so.

Neither the District Court nor the Circuit Court found their jurisdiction lacking or abstained from rendering a determination. The substantive issue in the case *sub judice* is whether the injunctive order affirmed by this Court in *Sloan v. Lemon,* supra, must be modified in light of this Court's holding in *Lemon II,* supra. The issue is well defined by the previous decisions of this Court. The determination is a legal one, and a plenary hearing would serve no purpose.

The District Court and Court of Appeals had all the information necessary to fully review petitioners' claim. Pursuant to their discretionary power to modify or refuse to modify an injunction because of an alleged change of law, the District Court and Court of Appeals considered petitioners' arguments, and refused to modify the injunction. Petitioners' petition for a writ of certiorari misses

the mark when it asserts that the federal forums refused to hear this case. Petitioners' dissatisfaction is more properly directed at the decision which was, in fact, rendered by the District Court and affirmed by the Court of Appeals.

II. The District Court and Court of Appeals Correctly Refused To Modify an Order Which Had Previously Been Affirmed by This Court

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Petitioners assert that respondent Grace Sloan, concurred in their belief that "there was a real possibility that the law had changed" (Petitioners' Brief at 8). Respondent Sloan believed then and believes now that the applicable law has not changed, and any amendment or modification of the injunctive order would be erroneous. The rationale for respondent Sloan joining in the petition for declaratory relief was to insure that the proper Court heard and settled this dispute.[1] Respondent Sloan submits that the dispute has now been properly heard and adjudicated by the appropriate forum. Consequently, there is no basis upon which this Court should grant certiorari.

Petitioners, on the other hand, claim that the District Court's and Court of Appeals' decision is in conflict with this Court's decision in *Lemon* [*II*], supra, and, therefore, this Court should review this case. There is, however, a great factual difference between Act 109[2] which was before this Court in *Lemon I and II*, and Act 92[3] which was before the Supreme Court in *Sloan v. Lemon*, supra. There is, moreover, a great difference between the operation of the two acts prior to the time they were each held unconstitutional by this Court. Finally, there is a great difference between the course of the litigation in the two cases. All three factors render this Court's *Lemon II* analysis inapplicable to the case *sub judice*.

The *Lemon I and II* statute authorized the payment to non-public schools of the actual costs incurred in providing specific secular educational services pursuant to purchase-of-service contracts with the State. The program was in full operation for two and one-half years before this Court declared it unconstitutional in June, 1971. *Lemon II*, 411 U.S. at 196-97. Payments had been made by the State to the non-public schools for the two school years beginning in September 1968 and ending in June 1970. The question before this Court in *Lemon II* was whether payments could be made as well for the 1970-71 school year.

The *Sloan* Act authorized the State to reimburse parents for a portion of tuition expenses incurred in sending their children to non-public schools. The Act became law on August 27, 1971. By the terms of the Act, parents were given until July 15th following the completion of the school year to apply for reimbursement. 24 P.S. §5706 (Supp. 1976-1977). Payments were to be made no later than September 15th following the completion of the school year. No payments were ever made under this Act since before the completion of the first school year following

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[1] See paragraphs six and nine of the Petition for Declaratory Relief at p. A-11 of petitioners' appendix.

[2] "Non-public Education and Secondary Education Act," Act of June 19, 1968, P.L. 232, No. 109, 24 P.S. §§5601-5608 (Supp. 1976-1977).

[3] Parent Reimbursement Act for Non-public Education, Act of August 27, 1971, P.L. 358, No. 92, 24 P.S. §§5701-5710 (Supp. 1976-1977).

its enactment, the Act was declared unconstitutional and all payments thereunder were enjoined. *Sloan,* supra, 413 U.S. at 827.

The Acts, then, in their operation, are completely distinguishable. The *Lemon I and II* Act was ruled constitutional by the District Court, *Lemon v. Kurtzman,* 310 F. Supp. 35 (E.D. Pa. three-judge court 1969) and continued in operation for two and one-half years until this Court reversed. The *Sloan* Act never went into operation[4] since payments were enjoined by the District Court prior to the first time that payments could have been made under it. The former was a functioning program; the latter never was.

Thus, in determining the applicability of *Lemon II's* discussion of reliance to the facts of this case, it is necessary to focus on three important facts: (1) No payments were ever made under the *Sloan* statute; (2) plaintiff's in the *Sloan* case made timely application for injunctive relief to preclude any payment from being made; and (3) in *Lemon II,* the District Court made a factual determination that there was reliance and this Court accepted this finding; here the District Court refused to find reliance.

In *Lemon II,* plaintiffs slept on their rights and did not attempt to stop any payments under the Act until after this Court had declared the Act unconstitutional. This

[4] It is true that the Act was in operation to the extent that the Authority created by Act was established and that many parents did make application for payment. However, it was not "in operation" in the same sense as the *Lemon I and II* Act wherein the State actually reimbursed the schools for their services for two school years and entered into contracts with the schools for the third school year.

Court gave great emphasis to that tactical decision of plaintiffs, noting that:

> "The significance of appellee schools' reliance is reinforced by the fact that appellants' tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State under Act 109." *Lemon II,* supra, 411 U.S. at 204.

No such argument can be made here since payments under the *Sloan* Act were enjoined at the earliest possible time.

In *Lemon II,* this Court gave great weight to the District Court's determination that the schools had relied on the continued validity of the Act in entering into and performing under contracts with the State for the year prior to the Act's invalidation by this Court. In fact, this Court specifically noted that counsel for plaintiffs had conceded reliance. *Lemon II,* supra, 411 U.S. at 204 n.5. The procedural posture of *Lemon II* is not akin to this case. In *Lemon II,* this Court noted that the District Court was vested with broad discretionary power, and their own power of appellate review was correspondingly narrow. *Id.* at 200. Later in this Court's opinion, obviously with its role as a reviewing court in mind, this Court held:

> "On this record the District Court could reasonably find reliance on the part of the appellee schools . . ." *Id.* at 206.

On the instant record, the District Court reasonably has found no reliance sufficient to justify any modification.

The Court of Appeals affirmed this finding. There are ample facts to support this holding, and this further supports the consistency of these holdings. Respondent Sloan submits there is no basis for the allegation of conflict between these decisions.

Finally, it must be noted that this Court in *Lemon II* viewed the school's reliance interest as one variable in the balancing test. *Lemon II* at 203. The other variable to be evaluated is the "constitutional interest at stake" in its original decision in *Lemon I*. The First Amendment violation which this Court found present there was that the program fostered an excessive entanglement between religion and the State. This Court in *Lemon II* concluded that the very factors which created such entanglement had already occurred and so the final payment for the last year of the Act's life would not give rise to any further entanglement. Hence, this Court concluded that, on balance, the constitutional harm was slight when weighed against the reliance by the schools (which reliance was conceded by the parties).

The "constitutional interest at stake" in *Sloan v. Lemon,* supra, was that the "primary effect" of paying money to the parents of children in non-public schools constituted the advancement of religion and was thus violative of the Establishment Clause. That constitutional violation cannot be cured as was the entanglement violation in *Lemon I*. For whatever time period petitioners urge that payments be made, the insuperable fact remains that such payment would be unconstitutional.

Hence, the *Lemon II* analysis cannot apply when this Court rules that the primary effect of legislation is the advancement of religion. Unlike "entanglement," that statutory defect cannot be cured. Nor can payments be made at any time under a statute, the primary effect of which advances religion.

III. The State's Compliance With a Federal Court Order Prohibiting Payment Under an Unconstitutional Statute Is Not a Taking of Property Without Due Process of Law

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Petitioners present a novel procedural due process claim. They assert that the respondent's compliance with the District Court's order perpetually enjoining the respondent from paying funds under Act 92, which was affirmed by this Court, constitutes a taking of property in violation of the Fourteenth Amendment's Due Process Clause. This argument is specious.

To support their argument, petitioners must prove a legally cognizable property interest in the funds allocated by this Act. *Goss v. Lopez,* 419 U.S. 565, 572, (1975). They also must prove that the State deprived them of this property. *Id.* at 574. Finally, they must prove that the taking of their property was accomplished without meaningful notice and hearing. *Id.* at 579.

Petitioners had no property interest in the moneys that were collected for eventual reimbursement. The Fourteenth Amendment is not, itself, a source of any property rights. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *Goss v. Lopez,* supra, at 572. "Rather they [property rights] are created and their dimensioins are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez,* supra at 572-573.

In the case *sub judice* the property rights must flow, if at all, from Act 92.[5] An examination of the Act evidences no intent to create any property rights. In fact, section nine of the Act evidences a strong contrary intent. In Section seven of the Act, the legislature specifies tuition reimbursement payments of $75.00 per elementary student and $150.00 per high school student. Section nine, however, provides that in the event of insufficient moneys the tuition reimbursement payment is to be reduced to a percentage computed by dividing the number of claims into the amount of moneys. (See petitioners' Appendix at A-5.) No parent was ever reimbursed under the Act, nor was any sum certain ever guaranteed. Unlike *Lemon v. Kurtzman II*, supra, no contract was signed between the State and parents. Petitioners had no more than a "unilateral expectation" rising from the passage of a bill by the State Legislature. Clearly, this is not enough:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, supra at 577.

The State did not deprive petitioners of these funds. The statutory authorization for payment was declared unconstitutional and a Federal Court enjoined the State from making payments. To characterize that Court's injunction against the State as a taking by the State, is a clear distortion of the meaning of the Due Process Clause and should be summarily rejected.

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[5] The full text of this Act is set forth at pp. A-1 to A-6 of Petitioners' brief.

CONCLUSION

For all of the above reasons, Respondent Sloan respectfully requests that this Court deny petitioners' petition for writ of certiorari.[6]

Respectfully submitted,

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[6] Petitioners claim the three-judge District Court and the Court of Appeals have "constructively" certified this question to this Court. This contention overlooks the fact that 28 U.S.C. §1254(3) provides this Court with power to review a question certified "at any time by a Court of Appeals of any question of law . . . to which instructions are desired. . ." Consequently, there is no reason to assume that the lower Court would constructively certify a case, rather than employ the jurisdictional avenue available for certification of appropriate questions. Moreover, there is no evidence of an unwillingness to decide this issue. Petitioners' contentions were squarely rejected by both the District Court and Court of Appeals.